PENDAKWA RAYA

v.

ABD. MANAP OTHMAN

HIGH COURT MALAYA, ALOR SETAR
MOHD. SAARI YUSOFF JC
[CRIMINAL APPEAL NO. 58-17-88]
12 JANUARY 1992

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs - Accused alone in the house - A set of keys to the house given to him - Owner of house moved out in 1986 - Drugs found in the bedroom, travelling bag, tupperware and jacket pocket - Admissibility of alleged admission - Dangerous Drugs Act s. 39B(1)(a).*

EVIDENCE: *Admisibility of oral statement - Confession - Accused under arrest - No caution - Impeachment - Purported evidence prejudicial to the defence.*

The accused was charged under s. 39B(1)(a) of the DDA 1952 for trafficking in dangerous drugs, that is, cannabis.

The accused was staying in a one-bedroom house. He was entrusted with the house by the owner who had moved out with his family in 1986. The accused was handed a set of keys to the house. He frequented his parent's house to have his meals.

At the time of the raid the drugs were found in the bedroom which door was closed but not locked, in a travelling bag, in a tupperware and in a jacket pocket. At the time of the raid the accused was alone in the house and the drugs were concealed in the bedroom.

The prosecution sought to introduce certain oral statements made by the accused to the police. The defence objected on the grounds that the accused was under arrest rendering such statement inadmissable as no caution was administered.

The prosecutions' application to impeach PW10 was allowed. His evidence was materially inconsistent with his previous statement to the police.

Held:

[1] From the evidence adduced it would appear that once inside the house, the police party proceeded to search the house starting with the kitchen. Throughout the search of the house, the accused was being held by PW3 (which point was not disputed). It seemed that the oral statement was made as result of inquiries made by PW2 when the police party and the accused were in the bedroom of the house. In the instant case force was being used to restrain the accused. In the result the act of the Police in holding the accused constituted arrest, which act rendered the oral statement inadmissable.

[2] PW10 and his friends were in the house on the night of 24 October 1987 and stayed back till 5 pm 25 October 1987. They came to watch T.V. and listen to music. Although they put up a night in the house, they did not bring extra clothings. They had their own house elsewhere and stayed with their parents. PW10 and friends were mere guests at the house and did not stay there in the house on a permanant basis. It is inherently incredible for any of them to have kept the impugned drugs in the bedroom. They would not have kept it in the house where it could not be retrieved easily. Moreover they had no key to the house. Of the two sets of key, it seemed one set was kept by PW11 and the other by the accused.

[3] More importantly by virtue of the accused's belongings being found together with 260.3 grammes of the impugned drugs, it pointed strongly towards the accused having knowledge of the impugned drugs.

[Accused found guilty and convicted.]

Cases referred to:

Jayaraman & Ors. v. PP [1982] CLJ (Rep) 130 ***(foll)***
Shaaban & Ors. v. Chong Fook Kam & Anor. [1969] 2 MLJ 219 ***(cit)***
Haw Tua Tau v. PP [1981] CLJ (Rep) 11 ***(foll)***
Dato' Mokhtar Hashim & Anor. v. PP [1983] CLJ (Rep) 101 ***(cons)***
PP v. Yuvaraj [1969] 2 MLJ 91 ***(foll)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 37A(1)(b), ss. 37(b), 37(d), 37(da), 37(g)

For the prosecution - Tun Ab. Majid bin Tun Hamzah; Timbalan Pendakwa Raya
For the accused - Hoe Thean Sun; M/s. Hoe & Ahmad Zaki

JUDGMENT

Mohd. Saari Yusoff JC:

The accused is charged under s. 39B(1)(a) of Dangerous Drugs Act 1952 for trafficking in dangerous drugs on his own behalf, to wit. 293.7 grammes cannabis at unnumbered house at Kampung Tok Sedau Batu 24½ Sungai Tiang Road Pendang Kedah at about 6 p.m. on 25 October 1987, which offence is punishable under s. 39B(2) of the same Act.

In the instant case, the prosecution seek to rely on the presumption under s. 37(b) DDA, 1952. What then are the evidence adduced by the prosecution to show that the accused had the care or management of the house?

(i) The accused (hereinafter referred to as "T") was alone in unnumbered house at Kampung Tok Sedau Pendang Sg. Tiang Road Pendang Kedah (hereinafter referred to as "the house"). It was one-bedroom house.

(ii) T was entrusted by Sharif (PW11) to look after the house after he (PW11) and his family had moved out to stay in Kuala Lumpur at the end of 1986.

(iii) a set of keys of the house was handed to T.

(iv) T stayed in the house as substantiated by the evidence of Sharif (PW11), Sofian (PW13) and Osman (PW12). T still frequented his parent's house at Sg. Tiang to have his meal.

(v) At the time of the raid, the impugned drugs was found in the bedroom which door was closed but not locked. Of the impugned drugs weighing 293.7 grammes, 260.3 grammes was found in a travelling bag (P4), 31.4 grammes in tupperware (P10) and 2.0 grammes in a jacket pocket (P14).

(vi) According to the chemist (PW1), the impugned drugs was cannabis as defined under DDA 1952.

On those facts and surrounding circumstances of the case, I find and so hold that s. 37(b) DDA, 1952 would apply. Further, by reason of the fact that the impugned drugs were concealed in the house, s. 37(g) of the Act would also apply.

At the time of the raid, the impugned drugs were concealed in the bedroom while T was alone in the house frying nuts in the kitchen not far from the bedroom. The bedroom door was closed but not locked. In the premise, I find and so hold that the s. 37(d) of the Act is activated. As the weight of the impugned drugs was 293.7 grammes, s. 37(da) of the Act would apply.

During the trial, the learned DPP sought to introduce certain oral statement made by T to PW2. The learned defence Counsel objected on the ground that T was under arrest rendering such statement inadmissable. No caution under s. 37A(1)(b) DDA 1952 was administered.

From the evidence adduced, it would appear that once inside the house, the police party led by PW2 proceeded to search the house starting with the kitchen. It is significant to note that throughout the search of the house, T was being held by DPC Subardi (PW3) (which point was not disputed). It seemed that the oral statement was made as result of inquiries made by PW2 when the police party and T were in the bedroom of the house.

In *Jayaraman & Ors. v PP* [1982] 2 CLJ (Rep) 130, Suffian LP cited with approval a passage by Lord Devlin in the Privy Council's case of *Shaaban & Ors. v Chong Fook Kam & Anor.* [1969] 2 MLJ 219, which at p. 220 *inter alia* states:

> An arrest occurs when a police officer states in terms that he is arresting or **when he uses force to restrain the individual concerned.** It occurs also when by words or conduct he makes it clear that he will, if necessary, use force to prevent the individual from going when he may want to go. It does not occur when he stops an individual to make enquiries. (Emphasis is mine)

In the instant case, unlike *Jayaraman's* case, force was being used to restrain T. In the result, I hold that the act of the police in holding T constituted arrest, which act rendered the oral statement inadmissable.

Upon the evidence before the Court, at the end of the prosecution's case, I concluded that a *prima facie* case is made out within the principle as laid down in *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11.

The defence's story was that on the night of 24 October 1987, Mat Sirat and friends were in the house and stayed there till 5 p.m. next day 25 October 1987. On the morning of 25 October 1987, he left for work at a latex collecting station at Felda Sg. Tiang about two miles from the house and returned about 5 p.m. T disclaimed knowledge about the impugned drugs in the bedroom.

The underlying theme of the defence's case was that someone who had access to the house could have kept the impugned drugs in the bedroom, of which drugs T disclaimed any knowledge.

From the evidence gathered in the defence's case, it seems to me that apart from T, the other persons who had access to the house were PW11 (house owner), Mat Sirat (PW10) and friends.

In Sharif (PW11)'s case, it was true that there were household goods and other items in the house at the time of the raid, which goods were left behind by PW11. However, the fact remained that PW11 and his family had ceased to stay in the house since the end of 1986 and rarely visited the house. From T's evidence, the last time PW11 was in the house was about a month prior to the raid. On the other hand, PW11 claimed that since shifting to Kuala Lumpur, he went to the house only once but did not put up a night in the house.

Considering the fact that PW11 was a resident of Kuala Lumpur and that he rarely visited the house, I regard it as inherently incredible for PW11 to have kept the impugned drugs in the house.

In the defence's case, it was averred that Mat Sirat (PW10) and friends were in the house on the night of 24 October 1987 and stayed back till 5 p.m. 25 October 1987. They came to watch T.V. and listen to music. Although they put up a night in the house, they did not bring extra clothings. From the defence's evidence, it seemed that T's friends had their own home elsewhere. They stayed with their parents.

Bearing in mind that Mat Sirat (PW10) and friends were mere guests at the house and did not stay in the house on a permanent basis, I find it as inherently incredible for any of them to have kept the impugned drugs in the bedroom. Had they been trafficking or dealing in such drugs, to my mind, they would not have kept it in the house, where it could not be retrieved easily. Moreover, they had no key to the house. Of the two sets of key, it seemed that one set was kept by PW11 and the other by T.

Another aspect of the prosecution's case against T was that T's letters (P21A and C), T's personal documents (P23 to 27), magazines (P19A & B) and other items were found in the bag (P4) in which 260.3 grammes of the impugned drugs were found, which fact was substantiated by the evidence of raiding officer (PW2). However, T repudiated PW2's evidence saying that the said letters and documents were kept at the rack of a side table in the lounge.

With regard to the letters and personal documents, by nature of its content, I find it as inherently incredible for such letters and documents to have been kept at a side table in the lounge.

In the case of letters from friends especially from the opposite sex, the natural and probable conduct of a person would be to keep it in a secluded place and not at a rack of a side table in the lounge.

To recapitulate, in a nutshell, the defence is saying that someone had kept the impugned drugs in the bedroom. If anything, the defence had succeeded in proving that by the presence of guests in the house, it afforded an opportunity for them to keep the impugned drugs in the bedroom. Beyond that, there was no credible evidence whatsoever to substantiate the defence's averment that another person was responsible in keeping the impugned drugs there. However, more importantly, by virtue of T's belongings being found together with 260.3 grammes of the impugned drugs, it pointed strongly towards T having knowledge of the impugned drugs.

Further, if it was true that Mat Sirat (PW10) and friends were at the house on 24 and 25 October 1987, there was no evidence whatsoever to suggest that they at any time brought any kind of package to the house or that they acted suspiciously.

And further, it was not established that any person had grudges against T, so as to fix up T by planting the impugned drugs in the bedroom.

Regarding the identification of the impugned drugs, PW8 (I.O.) appeared to be shaken and unsure of himself during cross-examination. However, later in re-examination, he was more certain and positive. Having viewed the evidence in this case as a whole and bearing in mind that there was no break in the chain of evidence as to the custody of the impugned drugs, I am satisfied that the impugned drugs was the very drugs recovered from the house at the time of the raid.

With regard to the veracity of the prosecution witnesses, they impressed me as honest and reliable. As a whole, their evidence appeared to be reasonable and inherently credible. Hence, I accept their evidence particularly the evidence of PW2 (raiding officer), PW8 (IO), PW1 (Chemist), and PW11 (house owner).

Adverting to the evidence of Mat Sirat (PW10), I allowed the learned DPP's application to have his evidence impeached as being materially inconsistent with his previous statement to the police (*Dato' Mokhtar Hashim & Anor. v. PP* [1983] CLJ (Rep) 101). In any event, I would have thought that the purported evidence which the learned DPP sought to adduce appeared to be prejudicial to the defence.

Regarding the clothings (P32), I am not satisfied beyond reasonable doubt as being the clothings in the house at the time of the raid on 25 October 1987. However, at time of the raid, it could not be denied that there were clothings in the house as shown in photographs (P29E, F, G and I).

With regard to the veracity of T, considering the inherent improbabilities of his evidence taken together with the demeanour of T in Court and the whole circumstances of the case, I find that T is not a witness of truth. Having tested the defence's case against the totality of the evidence, it is my finding that the defence had failed to rebut the presumptions under ss. 37(b), 37(d), 37(da) and 37(g) DDA 1952 on balance of probabilities within the principle as laid down in *PP v. Yuvaraj* [1969] 2 MLJ 91. Further, the defence had failed to raise any reasonable doubt as to the guilt of T. Having heard the arguments of the learned defence Counsel and DPP, I am satisfied that the case against the accused had been proved beyond reasonable doubt. Accordingly, the accused is found guilty and convicted.

The accused is sentenced to suffer death by hanging.

Also found at [1992] 1 CLJ 692